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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY D. GADLIN, Defendant and Appellant.	A138384 (Alameda County Super. Ct. No. 167072)

Two months prior to the scheduled date for his murder trial, defendant Gregory D. Gadlin petitioned for leave to represent himself at trial pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). During the hearing on the petition, defendant acknowledged his petition arose in part from frustration with his appointed attorney. Without inquiring further, the trial court concluded the mixed motives underlying defendant's petition rendered it equivocal and denied the petition on that basis. Defendant was later convicted after a jury trial and sentenced to a life term.

Because we find no basis for concluding defendant's *Faretta* request was equivocal, we must reverse the conviction and remand for a new trial.

I. BACKGROUND

Defendant was charged in an information, filed October 6, 2011, with murder (Pen. Code, § 187, subd. (a)) and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). With respect to the murder charge, it was alleged defendant personally and intentionally discharged a firearm and caused great bodily injury. (Pen. Code,

§§ 12022.7, subd. (a), 12022.53, subd. (d).) Several prior convictions, including prior strike convictions and prior prison terms, were also alleged.

Defendant was found guilty of both counts following a jury trial, and the firearms allegations were found true. He was sentenced to prison for a term of 100 years to life.[1]

In November 2012, two months prior to the scheduled trial in January 2013, defendant filed a petition to proceed in propria persona. The motion was made on a preprinted form that enumerated various rights and required defendant to state, "[I]t is my personal desire that I be granted permission by the Court to proceed in propria person [*sic*] (acting as my own attorney) and that by making this request, I am giving up the right to be represented by a lawyer appointed by the Court."

The motion was heard the same day defendant executed the petition. The court initially confirmed defendant had filed and executed the petition to represent himself and was aware of the potential sentence associated with his crime. These colloquies followed, interspersed with cautions by the court with respect to the many rights defendant would give up by representing himself. Throughout, defendant expressed no hesitation with respect to his decision to represent himself:

"THE COURT: You have never represented yourself in any of the cases that you've had in the past?

"THE DEFENDANT: No.

"THE COURT: Now, those cases were not as serious as this case. What is it about this case that has changed so that you would want to represent yourself on this case?

"[¶] . . . [¶]

"THE DEFENDANT: I'm just exercising my right.

"THE COURT: Now, presently you are represented by a very experienced attorney. Mr. Keep, to my knowledge, has been an attorney specializing in criminal law

[1] We have not summarized the evidence underlying defendant's conviction because it is not material to the outcome of his appeal.

in the area of 40 years . . . . You understand that if you make this decision to represent yourself, you'll be giving up all of the advantages you might otherwise have had in having somebody with that experience representing you?

"THE DEFENDANT: Yes.

"[¶] . . . [¶]

"THE DEFENDANT: Yes. I already filed a motion for advisory counsel.

"THE COURT: Well, whether you get advisory counsel or not would only come about, if at all, . . . in the judge's discretion as to whether advisory counsel is needed. So that might or might not happen. Do you understand that?

"THE DEFENDANT: Yeah.

"THE COURT: Are you willing to take the risk in case it doesn't happen?

"DEFENDANT: Yes.

"[¶] . . . [¶]

"THE COURT: Now, are you taking this action today solely because of your desire to exercise your constitutional right to represent yourself or are you taking it for some other reason, in other words, because of some frustration that you might have out of the process, or some other reason where you might have frustration as to the particular attorney representing you; anything of that nature?

"THE DEFENDANT: A little bit of both.

"THE COURT: Well, I can only accept your petition to proceed in propria persona if your request to do so is unequivocal. [¶] Are you making the unequivocal decision to represent yourself?

"THE DEFENDANT: Those factors still remain.

"THE COURT: Those what?

"THE DEFENDANT: Those factors still remain that you just addressed.

"THE COURT: Could you explain what you mean by 'those factors'[?]

"THE DEFENDANT: You said was it out of frustration for the process or the particular attorney. I said it was a little bit of both. Those factors play into my decision.

"THE COURT: Well, which is the largest factor? In other words, are you truly saying to yourself, well, I know I have a constitutional right to have an attorney, but I also have a constitutional right not to have an attorney, so I want to forego my constitutional right to have an attorney in favor of my constitutional right not to have an attorney, or are you saying, well, I would not be doing this if I had the attorney I wanted?

"THE DEFENDANT: That would probably be true.

"THE COURT: All right. Well, I'm going to make this finding. Under the law, the *Faretta* right to exercise the right to represent one's self must be unequivocal, and I find that this decision is made equivocally, so the petition under *People versus Faretta* [*sic*] is denied."

Defendant has appealed his conviction, contending the trial court erroneously denied his *Faretta* motion and raising a series of errors in connection with his trial. We find it necessary to address only the *Faretta* issue.

II. DISCUSSION

In *Faretta*, the Supreme Court held, "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." (*Faretta, supra*, 422 U.S. at p. 817.) Accordingly, "Once a defendant proffers a timely motion to represent himself, the trial court must proceed to determine whether 'he voluntarily and intelligently elects to do so . . . . If these conditions are satisfied, the trial court *must* permit an accused to represent himself without regard to the apparent lack of wisdom of such a choice and even though the accused may conduct his own defense ultimately to his own detriment.' " (*People v. Joseph* (1983) 34 Cal.3d 936, 943, italics added.) Given the importance of the countervailing Sixth Amendment right to an attorney, however, courts are to indulge every inference against a waiver of counsel's assistance. (*People v. Marshall* (1997) 15 Cal.4th 1, 20 (*Marshall*).)

On appeal of a ruling under *Faretta*, we must review the entire record de novo to determine whether the invocation of the right of self-representation satisfies the decision's requirements, even where the trial court has failed to conduct a full and complete inquiry. (*Marshall, supra*, 15 Cal.4th at p. 24.) If the trial court's stated reason

for denying a *Faretta* motion is found to be improper, the ruling still will be upheld if the record as a whole establishes the motion could have been denied on an alternative ground. (*People v. Dent* (2003) 30 Cal.4th 213, 218 (*Dent*).) If erroneous, however, the denial of a proper *Faretta* request is reversible per se. (*People v. Boyce* (2014) 59 Cal.4th 672, 702 (*Boyce*).)

The trial court's concern for equivocation was not misplaced, since there is no question a trial court should deny an invocation of the right of self-representation that is not unequivocal. Our Supreme Court's most thorough exploration of the meaning of equivocation in this context occurred in *Marshall*. As the court initially observed, "the high court's emphasis in [*Faretta*] on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied." (*Marshall, supra,* 15 Cal.4th at p. 21.) With apparent approval, the court noted other courts had "declared that a motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal" and held "a court 'properly may deny a request for self-representation that is a "momentary caprice or the result of thinking out loud." ' " (*Ibid.*) At bottom, the court concluded, "in order to protect the fundamental constitutional right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant *truly desires* to represent himself or herself. [Citations.] . . . [T]he defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Id.* at p. 23, italics added.)

Cases in which a defendant was found not to have made an unequivocal motion for self-representation generally involve a defendant whose request is conditional (e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 98–99) or not clearly and affirmatively stated. (E.g., *People v. Marlow* (2004) 34 Cal.4th 131, 147 [defendant's question, " 'Is it possible' " for him to represent himself, construed as a request for information]; *People v. Danks* (2004) 32 Cal.4th 269, 295–297 [defendant made "fleeting statements" about

representing himself in the midst of "diatribes" about his treatment].) Often such requests arise in the context of motions for substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), when defendants frustrated by their relations with their attorneys express the generalized sentiment that even self-representation would be preferable to continuing with current counsel. (E.g., *People v. Stanley* (2006) 39 Cal.4th 913, 932–933; *People v. Roldan* (2005) 35 Cal.4th 646, 678, 683–684, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22 [during hearing on *Marsden* motion, defendant said, " 'I'll be my own lawyer if he is going to be like that.' "].)

Despite that common context for a finding of equivocation, the desire to represent oneself out of dissatisfaction or "frustration" with counsel, standing alone, does not make a *Faretta* request equivocal, as the trial court appears to have believed. As the Supreme Court has noted, a defendant "may choose self-representation in order to control defense strategy." (*Boyce, supra*, 59 Cal.4th at p. 704.) In *People v. Michaels* (2002) 28 Cal.4th 486, the defendant argued the trial court erred in granting his request under *Faretta*, contending his request to represent himself was not unequivocal "because [the defendant] made it clear that he only wanted to represent himself if the court refused to remove [appointed counsel] as his attorney." (*Id.* at p. 524.) The court rejected the argument, noting the defendant "confuses an 'equivocal' request with a 'conditional' request. There is nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself." (*Ibid.*) The court found no error in granting because, after the defendant made his request, the trial court discussed the topic at length with the defendant, who "made it unequivocally clear that he wanted to represent himself." (*Ibid.*; see similarly *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529–1530 [clearly stated *Faretta* request motivated by dissatisfaction with counsel not equivocal]; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1389–1390 [same].)

Reviewing the brief record associated with defendant's petition, we find no evidence of equivocation. Nothing suggests his request was the product of a temporary whim, annoyance or passing frustration, a momentary caprice, thinking out loud, or any

of the other euphemisms for an impulsive request, made on the basis of emotion rather than a genuine desire for self-representation. Defendant's request was not a spontaneous outburst in the course of a hearing called for a different purpose. On the contrary, he initiated the request by filling out a written form, demonstrating the request was the product of a considered decision. At the hearing, in response to the court's questions, defendant expressed no uncertainty or hesitation about his choice. He merely acknowledged it was motivated, in part, by dissatisfaction with his attorney. On the available evidence there was no basis for concluding defendant did not "truly desire[]" to represent himself. (*Marshall, supra*, 15 Cal.4th at p. 23.)

In arguing for equivocation, the Attorney General places primary reliance on *People v. Phillips* (2006) 135 Cal.App.4th 422, but the sharp differences between the circumstances of that decision and ours merely illustrates the lack of equivocation here. The request of the defendant in *Phillips* was made in the course of a *Marsden* hearing, during which the defendant, according to the court, was in a "caliginous mood." (*Id.* at p. 425.) Defendant asked for possession of his attorney's files " 'Because I feel maybe I should represent myself.' " (*Ibid.*, italics omitted.) At one point in the hearing, he also suggested, " 'maybe I could do better myself.' " (*Ibid.*) When the court initially inquired whether the defendant wanted to represent himself, the defendant responded affirmatively. Upon further questioning, however, he said he would rather have an attorney, if he could have an attorney in whom he had confidence. Ultimately, upon the court's assurances the defendant's appointed counsel was experienced and competent, the defendant agreed to continue with his present attorney. (*Id.* at pp. 426–427.) As the foregoing suggests, *Phillips* was a classic case of an impulsive *Faretta* request, reflective of a defendant's pique rather than any considered decision to undertake self-representation. There are no parallels here. As discussed above, nothing in the record suggests defendant had not made a considered, sincere decision to undertake self-representation.

The Attorney General also argues we should infer defendant abandoned his request because he never renewed it. The trial court, however, did not deny defendant's

request because the court found it to be impulsive or ill-considered, thereby leaving open the possibility that a renewed request after time for reflection might be successful. Rather, the court told defendant his *Faretta* request would be denied so long as it was motivated, even in part, by dissatisfaction with his attorney. Because such dissatisfaction appears to have been the motive for defendant's request, the court's ruling amounted to the type of categorical denial that precludes an inference of abandonment. As the Supreme Court noted in *Dent*, in response to a similar argument, "We do not require trained counsel to repeatedly make a motion that has been categorically denied; how much more should we require of an untrained defendant seeking self-representation?" (*Dent, supra*, 30 Cal.4th at p. 219.)

We are not required to reverse on the basis of *Faretta* error if the record reveals an alternative ground for denying the motion (*Dent, supra,* 30 Cal.4th at p. 218), but no other ground appears. Because the motion was made two months before trial, there is no basis for finding it untimely, and the record does not suggest defendant had an ulterior motive, such as delay. There is no evidence of a history of disruption and no reason to conclude defendant was not " 'able and willing to abide by rules of procedure and courtroom protocol.' " (*People v. Welch* (1999) 20 Cal.4th 701, 734, italics omitted.) We have not been presented with any circumstances demonstrating a later waiver of the *Faretta* right. (See *People v. Weeks* (2008) 165 Cal.App.4th 882, 887–888 [defendant waives right of self-representation by retaining counsel].) Finally, there is no basis for concluding defendant was not mentally competent to make an informed decision to waive the right to counsel. (*Welch*, at p. 733.)

Because the wrongful denial of a *Faretta* request is reversible per se, we are required to reverse the judgment and remand for a new trial without reaching defendant's remaining claims. (*Dent, supra,* 30 Cal.4th at p. 222.)

III. DISPOSITION

The judgment of the trial court is reversed, and the matter is remanded to the trial court for further proceedings consistent with this decision.

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Margulies, J.

We concur:

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Humes, P.J.

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Banke, J.